

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 31, 2025

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PAUL D. DEARMIN, a single person,

Plaintiff,

v.

CITY OF CLE ELUM, a Washington

municipal corporation,

Defendant.

No. 1:23-CV-03165-SAB

**ORDER RE: MOTIONS FOR
SUMMARY JUDGMENT**

Before the Court are Defendant's Motion for Summary Judgment, ECF No. 51, and Plaintiff's Motion for Partial Summary Judgment, ECF No. 60. A hearing on the motion was held on March 25, 2025. Plaintiff was represented by James Carmody. Defendant was represented by Kenneth Harper.

Plaintiff is bringing this action pursuant to the Fifth Amendment takings clause of the U.S. Constitution, U.S. Const. Amend. V, and Article I, Section 16 of the Washington Constitution seeking compensation for the loss of direct access points to his commercial property after the City of Cle Elum completed the First Avenue Downtown Revitalization Project. He asserts his due process rights were violated, and City employees trespassed and committed waste when they came onto his property and removed fencing, retaining walls, and gates, as well as the access points.

Both parties filed Motions for Summary Judgment. Plaintiff asks the Court

ORDER RE: MOTIONS FOR SUMMARY JUDGMENT ~1

1 to grant summary judgment on his due process claim and his trespass/waste claim.
2 Defendant moves for dismissal of all the claims asserted by Plaintiff.

3 **Motion Standard**

4 Summary judgment is appropriate “if the movant shows that there is no
5 genuine dispute as to any material fact and the movant is entitled to judgment as a
6 matter of law.” Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless
7 there is sufficient evidence favoring the non-moving party for a jury to return a
8 verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250
9 (1986). The moving party has the initial burden of showing the absence of a
10 genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).
11 If the moving party meets its initial burden, the non-moving party must go beyond
12 the pleadings and “set forth specific facts showing that there is a genuine issue for
13 trial.” *Anderson*, 477 U.S. at 248.

14 In addition to showing there are no questions of material fact, the moving
15 party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of*
16 *Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled
17 to judgment as a matter of law when the non-moving party fails to make a
18 sufficient showing on an essential element of a claim on which the non-moving
19 party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party
20 cannot rely on conclusory allegations alone to create an issue of material fact.
21 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). When considering a
22 motion for summary judgment, a court may neither weigh the evidence nor assess
23 credibility; instead, “the evidence of the non-movant is to be believed, and all
24 justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255.

25 In considering cross motions for summary judgment, the court views the
26 evidence for each of the motions “in the light most favorable to the nonmoving
27 party” for that motion and determines “whether there are any genuine issues of
28 material fact and whether the district court correctly applied the relevant

1 substantive law.” *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 832 (9th Cir.
2 2002).

3 Whether government action has damaged the landowner’s right of access to
4 require compensation is normally an issue of fact to be determined by the trier of
5 fact. *Keiffer v. King Cnty.*, 89 Wash.2d 369, 374 (1977). However, summary
6 judgment is properly granted in a case where no reasonable factfinder could find
7 there has been a substantial impairment of access. *Id.*

8 **Background Facts**

9 Over the past decade, the City of Cle Elum, Washington began a downtown
10 revitalization project. In 2023, the City commenced work on Phase 3C of the
11 project. The project was intended to improve the streetscape, sidewalks and
12 landscaping through the downtown corridor. The project involved constructing
13 bulb-outs at intersections along East First Street, which runs through downtown
14 Cle Elum. It is also known as State Route 903.

15 Plaintiff owns real property at 102 East First Street in Cle Elum (“the
16 Property”). It is situated at the southeast corner of East First Street and North
17 Pennsylvania Avenue and had direct access to Pennsylvania Avenue and First
18 Street. The access points allowed for vehicle access from the public streets that
19 was sufficient to accommodate larger fuel delivery and service trucks. Plaintiff had
20 fenced the parcel and installed gates at the three access points.

21 Plaintiff asserts the City started planning for the removal of his access to
22 East First Street and Pennsylvania Avenue three years prior to the 2023 phase of
23 the project. In 2020, Plaintiff met with City representatives and was told the plan
24 included replacing both First Street driveways with a full height curb, sidewalk,
25 planters and lighting and moving the Pennsylvania Street access further south.
26 Plaintiff objected. He discussed various options with City representative, but no
27 agreement was made. A couple of years passed without any communication.
28 During that time, the City proceeded with preparation of construction and

1 engineering plans for Phase 3C. Specifically, a Demolition Plan was developed for
2 the Property that included removal of existing fences, gates, and retaining walls
3 located within the boundaries of the Property.

4 Plaintiff was not notified about the Demolition Plan. Instead, on June 13,
5 2023, Plaintiff learned that the project was moving ahead and contacted the City
6 representatives. He spoke with the City Public Works Director and told the
7 Director that he objected to any construction activity on the Property. He received
8 no written or verbal response.

9 In early July 2023, the City began its work on the Property. Plaintiff was out
10 of town. His counsel asked to pause the project, but the City continued to work on
11 the project. The Property's East Pennsylvania Avenue access point was moved 20
12 feet to the south. Both access points to East First Street were removed. A new
13 access point to the Property was constructed using the adjacent alley on the east.
14 Existing fencing and gates along East First Street and Pennsylvania Avenue were
15 removed. The retaining wall and fencing along the eastern portion of the Property
16 were cut and removed. The City placed new gates and fencing on the Property.

17 **Legal Framework**

18 **A. Takings**

19 The Takings Clause of the Fifth Amendment to the United States
20 Constitution, U.S. Const. Amend. V, and Article I, Section 16 of the Washington
21 Constitution prohibits governments from taking private property for public use
22 without just compensation. When the government physically acquires private
23 property for a public use, the Takings Clause imposes a clear and categorical
24 obligation to provide the owner with just compensation. *Cedar Point Nursery v.*
25 *Hassid*, 594 U.S. 139, 148 (9th Cir. 2021). Simply stated, the government must pay
26 for what it takes. *Id.* The Just Compensation Clause does not limit governmental
27 interference of property rights per se, but rather it places a condition on the
28 exercise of that power. *Id.* “Thus, government action that works a taking of

1 property rights necessarily implicates the constitutional obligation to pay just
2 compensation.” *Id.* (quotation omitted).

3 While the typical taking occurs when the government acts to condemn
4 property in the exercise of its power of eminent domain, inverse condemnation
5 recognizes that a taking may occur without such formal proceedings. *First English*
6 *Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S.
7 304, 316 (1987).

8 A partial taking occurs where the government takes only a portion of the
9 landowner’s property. *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th
10 Cir. 1999). “If the value of the remaining land, on a unit basis, diminishes when the
11 condemned parcel is removed from the larger whole, the landowner is entitled to
12 compensation ‘both for that which is physically appropriated and for the
13 diminution in value to the non-condemned property.’” *Id.* (quoting *U.S. v. 33.5*
14 *Acres, Okanogan Cnty.*, 789 F.2d 1396, 1398 (9th Cir.1986)). If the taking benefits
15 the remainder, the benefit may be set off against the value of the land taken. *Id.*
16 (quotation omitted).

17 **B. Due Process**

18 The Due Process Clause of the Fourteenth Amendment imposes constraints
19 on governmental decisions that deprive individuals of “liberty” or “property”
20 interests. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The fundamental
21 requirement of due process is an opportunity to be heard at a meaningful time and
22 in a meaningful manner. *Id.* at 333. “The right to be heard before being condemned
23 to suffer grievous loss of any kind, even though it may not involve the stigma and
24 hardships of a criminal conviction, is a principle basic to our society.” *Id.*
25 (quotation omitted).

26 A city or county is required to provide due process if it deprives an
27 individual of a protected property interest. *Harris v. County of Riverside*, 904 F.2d
28 497, 503 (9th Cir. 1990). In determining whether a county or municipality is

1 required to comply with due process, the Court must answer two questions: (1)
2 whether the City’s decision was the type of government action to which due
3 process applies; and (2) whether the City’s decision deprived the individual of a
4 protected property interest. *Id.* Courts have recognized there is a right to a pre-
5 deprivation hearing when a relatively small number of persons are concerned, who
6 are exceptionally affected. *Id.*

7 “Once it is determined that due process applies, the question remains what
8 process is due.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In determining
9 whether a pre-deprivation hearing is required, the Court looks to the factors set
10 forth in *Mathews*: (1) the private interest that will be affected by the private action;
11 (2) the risk of an erroneous deprivation of such interest through the procedures
12 used, (3) the probable value, if any of additional or substitute procedural
13 safeguards; and (4) the Government’s interest, including the function involved and
14 the fiscal and administrative burdens that the additional or substitute procedural
15 requirement would entail. *Mathews*, 424 U.S. at 335.

16 C. Trespass / Waste

17 Under Washington law, a “trespass” is any intentional invasion of an
18 individual’s interest in the exclusive possession of property. *Lavington v. Hillier*,
19 22 Wash. App.2d 134, 148 (2022) (citation omitted). Washington’s trespass statute
20 provides liability for three types of conduct by a person who goes onto the land of
21 another: “(1) removing valuable property from the land, (2) wrongfully causing
22 waste or injury to the land, and (3) wrongfully injuring personal property or real
23 estate improvements on the land.” *Ofuasia v. Smurr*, 198 Wash. App. 133, 147
24 (2017) (quotation omitted); *see also* Rev. Code Wash. § 4.24.630(1). Under the
25 statute, “a person acts ‘wrongfully’ if the person intentionally and unreasonably
26 commits the act or acts while knowing, or having reason to know, that he or she
27 lacks authorization to so act.” § 4.24.630(1). “A trespass differs from a taking in
28 that to constitute a taking, the intrusion must be chronic and not merely a

1 temporary interference which is unlikely to recur.” *Phillips v. King County*, 136
2 Wash.2d. 946, 857 n.4 (1998).

3 **Plaintiff’s Motion for Summary Judgment**

4 Plaintiff asserts the City deprived him of a cognizable property interest
5 without due process of law when it failed to provide him a pre-deprivation hearing
6 before moving his access points, and removing his gates, fencing, and retaining
7 wall. The Court agrees. The record is clear that the City followed an unusual and
8 unconstitutional process of “take now, and pay later (maybe).” The U.S.
9 Constitution does not work that way.

10 Because of its exceptional effect on Plaintiff as a specific, identifiable
11 individual, the City’s project is the type of government action that is subject to
12 procedural due process constraints. *See Harris*, 904 F.2d at 503. Second, there are
13 no questions of material fact regarding the efforts taken by the City to provide
14 Plaintiff with notice and opportunity to be heard, once it decided to move forward
15 with Phase C of the Downtown Beautification Project. There were none.

16 Here, no reasonable trier of fact would find that it would have been
17 impracticable to either initiate condemnation proceedings or hold even an informal
18 hearing to allow Plaintiff to present alternatives to the proposed Demolition Plan
19 and removal of access points. The Demolition Plan clearly anticipated that
20 Plaintiff’s property would be impacted. A reasonable trier of fact could only
21 conclude that the City of Cle Elum violated Plaintiff’s due process rights by failing
22 to provide him some type of hearing prior to moving his access points, and
23 removing his gates, fencing, and retaining wall. As such, summary judgment in
24 favor of Plaintiff is appropriate with respect to his Due Process claim. The issue of
25 damages is reserved for the bench trial.

26 On the other hand, genuine issues of material fact regarding the City’s
27 actions in removing the fencing, gates, and retaining wall exist that precludes
28 summary judgment on Plaintiff’s trespass / waste claim.

ORDER RE: MOTIONS FOR SUMMARY JUDGMENT ~7

Defendant's Motion for Summary Judgment

Defendant City of Cle Elum is asking the Court to dismiss all of the claims asserted by Plaintiff. At the heart of Defendant's arguments is that Plaintiff lacks admissible evidence on the diminution of fair market value of the Property. The Court previously denied Defendant's Motion to Strike Plaintiff's Declaration. ECF No. 81. Plaintiff's Declaration creates a genuine issue of material fact surrounding the issue of just compensation. As such, summary judgment on Plaintiff's taking claims is not appropriate. Moreover, for the reasons stated above, summary judgment on Plaintiff's remaining claims is not warranted.

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant's Motion for Summary Judgment, ECF No. 51, is **DENIED**.
2. Plaintiff's Motion for Partial Summary Judgment, ECF No. 60, is **GRANTED**, in part. Summary judgment in favor of Plaintiff and against Defendant is granted on Plaintiff's procedural due process claim.

IT IS SO ORDERED. The District Court Clerk is hereby directed to enter this Order and to provide copies to counsel.

DATED this 31st day of March 2025.



Stanley A. Bastian

Stanley A. Bastian
Chief United States District Judge